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No. 84-50

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

- against -

DIANA L. SPIRT, et al.,

Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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September 7, 1984

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The decision of the Second Circuit appears to alter this Court's August 1, 1983 compliance date

for equalizing male and female benefits paid by employer-sponsored pension plans and may have a substantial financial impact upon The City of New York.

The City is a defendant in a class action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000-e, et seq., and other laws, challenging the use of gender-based mortality tables in the calculation and payment of contributions and benefits by and to members of the New York City Employees' Retirement System. Women In City Government United, et al. v. City of New York, et al., 75 Civ. 2868 (MJL) (S.D.N.Y.). In 1981, the District Court found that the City's practices violated Title VII under the rationale of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), and ordered a trial to determine the appropriate remedy. Women In City Government United, et al. v. City of New York, et al., 515 F. Supp. 295 (S.D.N.Y. 1981). The matter is scheduled to go to trial before a Special Master

later this year.

The Second Circuit's decision will influence the outcome of Women In City Government on the issue of whether the City must equalize benefits for those who retired prior to August 1, 1983, the effective date of this Court's opinion in Arizona Governing Committee v. Norris, 463 U.S. _____, 103 S.Ct. 3492, 77 L. Ed. 1236 (1983). The Chief Actuary of the City of New York has estimated the potential cost to the City's five retirement systems of future benefits to pre-August 1, 1983 retirees at $288 million, with benefits retroactive to 1972 costing as much as several hundred million dollars more. The City of New York is required by law to amortize any unfunded liabilities of its retirement systems which could result from a retroactive award of benefits.

REASONS FOR GRANTING THE WRIT

RETIREMENT BENEFITS MUST BE EQUALIZED ONLY FOR SERVICE ACCRUED AFTER AUGUST 1, 1983.

In its opinion in Arizona Governing Committee v. Norris, 463 U.S. ____, 103 S.Ct. 3492 77 L. Ed. 1236 (1983), this Court addressed the issue of the relief to be awarded to remedy employer-sponsored pension plans' use of gender-based mortality tables. The Court, citing the financial and equitable considerations applicable to employer-sponsored pension plans in general, explicitly limited the remedy to benefits accrued after August 1, 1983.

The Second Circuit, on remand from this Court for reconsideration in light of Norris, failed to abide by this Court's ruling. The Second Circuit reinstated its earlier judgment requiring the equalization of retirement benefits for all service and for members who retired prior to August 1, 1983 because it concluded that there was no cost to

TIAA-CREF in awarding such relief. This ruling had the effect of diluting the clarity of this Court's decision in Norris and of opening in each case an inquiry as to the cost of retroactivity. Exposing employer-sponsored pension plans to such potential increased liability can only create uncertainty as to the means of achieving compliance with the Norris decision and raises the spectre of serious financial burdens.

The award of retroactive relief in a Title VII action lies in the discretion of the Court, to be exercised in accordance with the principles of equity. This Court has twice weighed the equities of retroactive relief in cases involving employer-sponsored pension plans' use of gender-based mortality tables. In both cases retroactive relief was denied. Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978); Norris, supra.

In Norris, retroactive equalization of retirement benefits was rejected as "unprecedented

and manifestly unjust." 103 S. Ct. at 3509 (Powell, J.). Citing a U.S. Department of Labor study estimating the cost to all employer-sponsored pension plans of retroactive relief at $817 million to $1260 million annually for the next 15 to 30 years, the Court held:

> There is no justification for this Court ... to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

Id. at 3510 (Powell, J.)

The precise meaning of the Court's holding was spelled out by Justice Powell in a footnote, as follows:

> In this respect, I agree with Justice O'CONNOR that only benefits derived from contributions collected after the effective date of the judgment [August 1, 1983] need be calculated without regard to the sex of the employee. . . .

Id.

As the opinions of Justice Powell and Justice O'Connor indicate, the decision of this Court to

deny retroactive relief was based not on the impact of the remedy on the defendant before the Court in Norris, but on the "devastating" fiscal impact such a remedy would have on pension plans generally. Id. at 3510 (Powell, J.); Id. at 3512 (O'Connor, J.). The Court's emphasis on the U.S. Department of Labor study of costs nation-wide underscores the Court's intention that, henceforth, such retroactive relief was to be awarded in accordance with the uniform August 1, 1983 compliance date established by the Court, and not on case-by-case determination of the fiscal impact of any particular retroactive remedy on a defendant pension plan. The Court's adoption of a uniform compliance date for the equalization of retirement benefits reflected the Court's balancing of the diverse equitable interests of pension system members, employers, and the public.

The Second Circuit, in its decision below, erred in taking the case-by-case approach, rather than applying the uniform compliance date laid down in Norris. While recognizing that Norris

"appears to foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans", Appendix to Petition For Writ ("Appendix") at 9a, the Second Circuit reinstated its award of retroactive relief based on its finding that the expectations of the male annuitants in Spirt differed from those in Norris. The Second Circuit held that this was a permissible result under Norris because (Appendix at 8a):

> [i]f ... the Norris majority intended to bar retroactivity in all annuity cases simply because equalization of benefits must inevitably burden someone, we would have expected to see some intimation of that view in Justice Powell's opinion.

Amicus curiae The City of New York respectfully submits that the Court not only "intimated" that the equalization of benefits prior to August 1, 1983 was not required, it explicitly held as much. Norris, 103 S. Ct. at 3510.

The law respecting the validity of gender-based mortality tables in the calculations of

retirement benefits was established with certainty only with this Court's decision in Norris. Pension administrators, given the significant sums of money involved, their fiduciary duty to be prudent, the potential liability to male annuitants, and different signals from the Circuit Courts*, had cause for uncertainty prior to Norris. This Court's decision to set August 1, 1983 as a benchmark date from which henceforeward contributions to public pension plans must purchase retirement benefits calculated on the basis of gender-neutral mortality tables brought certainty to this area of law and settled the expectations of retirement benefit recipients past and present. Above all, it allowed pension plan administrators and municipal officials to anticipate the liabilities they would incur in eliminating gender-based mortality tables, enabling then to

* Compare, e.g., the Ninth Circuit's decision in Norris, 671 F.2d 330 (9th Cir. 1982), and the Sixth Circuit's decision in Peters v. Wayne State University, 691 F.2d 235 (6th Cir. 1982), vacated and remanded, 103 S. Ct. 3566, remanded, 718 F.2d 1100 (6th Cir. 1983).

proceed with confidence in bringing their retirement systems into compliance with this Court's decisions.

The Second Circuit's decision below to award retroactive relief has brought renewed uncertainty to the administration of pension plans and related litigation. This Court should grant the petition for writ of certiorari to correct the Second Circuit's misreading of Norris and to reiterate the principles articulated in Norris.

CONCLUSION

For the reasons set forth herein, amicus curiae The City of New York respectfully urges that the petition for writ of certiorari to review the decision of the Second Circuit Court of Appeals be granted.

September 7, 1984.

Respectfully submitted,

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